

The rejection of claims 2-4, 6 and 8-13 under 35 USC §103(a) as being unpatentable over Ruddell in view of Brown is respectfully traversed insofar as this ground of rejection is applied to the claims as presently amended.

The Examiner acknowledges that Ruddell “discloses beetles as the target species” and Brown “discloses flies.” The present claims designate the target species as comprising stinkbugs. First, it is not apparent how a reference disclosing an apparatus for targeting beetles can be combined with a reference disclosing a structure which targets flies to arrive at a device which targets stinkbugs. It is well settled in the patent law that it is not open to an Examiner to combine non-analogous art to meet the limitations of a claimed invention [*In re Wood*, 202 USPQ 171; *In re Oetiker*, 24 USPQ2d 1443]. In *Oetiker*, the Federal Circuit stated that:

“...the combination of elements from non-analogous sources, in a manner that reconstructs applicant’s invention only with the benefit of hindsight, is insufficient to present a *prima facie* case of obviousness...”

Since Ruddell and Brown are concerned with the targeting of beetles and flies, respectively, both references are non-analogous art since they are clearly not within applicant’s field of endeavor and are not reasonably pertinent to the particular problem applicant seeks to resolve. It is only by using applicant’s own teachings and relying upon impermissible hindsight that one versed in the art would have been led to even contemplate combining the teachings of Ruddell and Brown. Moreover, it is impermissible to use the claimed invention as an instruction manual or “template” to piece together isolated disclosures and teachings of the prior art so that the claimed invention is rendered obvious. A rejection based on 35 USC §103 must rest

on a factual basis with the facts being interpreted without hindsight reconstruction of the invention from the prior art. Here, the Examiner has not borne the initial duty of supplying a factual basis for the rejection advanced. The Examiner apparently doubts that the invention is patentable and resorts to speculation, unfounded assumptions and hindsight reconstruction to supply the deficiencies in the factual basis necessary for the establishment of *prima facie* obviousness.

Ruddell specifies that the device disclosed therein for trapping beetles depends upon attraction to the trap of beetles which will

“...strike the portions of the baffle which project upwardly and will drop into the conduit through which they will pass and into the beetle container. In view of the fact that the baffle divides the open upper end or mouth of the conduit into a number of passageways, the conduit will be prevented from becoming choked. The force of the blow received when the beetles strike the baffles will cause them to be dazed and they will drop downwardly through the conduit into the beetle container...”
[page 2, lines 94-107]

The device of Brown depends upon the luring of flies by a gaseous attractant emanating from the device to within a container where they become trapped.

The claimed stinkbug trap depends for its operation and function on the tropism of flying insects which walk or crawl after flight. Thus, the channels defined by the fins of the claimed device are designed to encourage the natural movement of the walking or crawling insect at an upward direction where they become entrapped in the enclosed chamber. See the specification at page 4, first full paragraph, and the paragraph bridging pages 6 and 7. Thus, it is not seen how a reference which depends upon a physical blow to “daze” or “stun” a target

beetle can be combined with a reference which depends upon a gaseous effluent to lure a fly down into a container to render *prima facie* obvious a device which depends upon channeling a walking or crawling insect in an upward direction to become entrapped in a chamber which covers the top of the channels. There is simply no logical line running through these references which would suggest their being combined in this manner, other than the Examiner's hindsight reconstruction of applicant's invention utilizing applicant's own disclosure.

Finally, it is noted that the Examiner admits that Ruddell shows an "upside down" version of the claimed invention. Thus, it is stated at page 2, paragraph 2, of the Office Action mailed November 19, 1998, that:

"...Ruddell shows the fins on top of the receptacle in Fig. 1 but the top portion of the trap can be considered as the bottom and vice versa by merely inverting the drawing Figs." [Emphasis added.]

Thus, in order to read the Ruddell device on the claimed trap, it is necessary to invert or turn upside down the device depicted in Fig. 1 of Ruddell. Turning the Ruddell device "on its ear" would render the device incapable of the function for which it was designed and disclosed by Ruddell. It flies in the face of reason to hold that it would be *prima facie* obvious to invert a device to occupy a position that would render it inoperable for its designed purpose. If the Ruddell device were turned upside down, beetles flying into the baffles 30 and 31 would simply fall to the ground and not into the receptacle which was designed to capture the beetles.

Attention is directed to the decision in *In re Gordon*, 221 USPQ 1125, which is based upon a set of facts remarkably similar to those presented herein. In *Gordon*, the

appellants claimed a blood filter device which depended upon its being oriented in a certain position in order to direct incoming blood along a spirally upward path. The claimed device was rejected over a device designed to filter gasoline and other light oils. The Board of Appeals had held that the claimed device was "obvious" over the gasoline filter device on the ground that:

"...it would have been obvious to turn the French device upside down to have both the inlet and outlet at the bottom... No patentable distinction was created by viewing French's apparatus from one direction and the claimed apparatus from another..."

The CAFC reversed, stating that:

"...the question is not whether a patentable distinction is created by viewing a prior art apparatus from one direction and a claimed apparatus from another, but, rather, whether it would have been obvious from a fair reading of the prior art references as a whole to turn the prior art apparatus upside down... The mere fact that the prior art could be so modified would not have made the modification obvious unless the prior art suggested the desirability of the modification... Indeed, if the French apparatus were turned upside down, it would be rendered inoperable for its intended purpose..." [Emphasis added.]

Similarly, in the present case, turning the Ruddell device upside down would render it inoperable for stunning and capturing beetles. In effect, therefore, the reference actually teaches away from the proposed modification of the apparatus in order to meet the claimed device.

For the reasons set forth hereinabove, therefore, it is respectfully requested that this ground of rejection be withdrawn.

Applicant has earnestly endeavored to place this application in condition for allowance, and an early action toward that end is earnestly solicited.

To the extent necessary, applicant petitions for an extension of time under 37 CFR §1.136. Please charge any fees due to Deposit Account No. 11-0610 (Docket No. 5383).

Respectfully submitted,

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